KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900
FACSIMILE:
(202) 326-7999

November 14, 2002

Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Application by SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in California*, WC Docket No. 02-306

Dear Ms. Dortch:

On behalf of SBC Communications Inc. ("SBC"), I am writing to inform you that representatives of SBC met yesterday with FCC staff to discuss section 709.2 of the California Public Utilities Code and the public interest standard under section 271 of the 1996 Act. John Rogovin, Linda Kinney, and Chris Killion of the Office of General Counsel participated on behalf of the FCC. Paul Mancini, William Lake, and Jon Nuechterlein participated on behalf of SBC. The materials SBC circulated at this meeting are enclosed as Attachment 1 to this letter. In addition, at the request of FCC staff, I am enclosing as Attachment 2 the transcript of the portion of the California Public Utilities Commission's September 19, 2002, public meeting devoted to section 271 of the 1996 Act and section 709.2 of the California Public Utilities Code. Finally, also at the request of FCC staff, enclosed as Attachment 3 is information relating to timeliness of jeopardy notices, OSS versioning, and interim pricing of DS1 and DS3 loops.

In accordance with the Commission's Public Notice, DA 02-2333 (Sept. 20, 2002), SBC is filing this letter and its attachments electronically through the Commission's Electronic Comment Filing System.

Yours truly,

Colin S. Stretch

Attachments

cc: John P. Stanley
Renée R. Crittendon
Tracey Wilson
Lauren J. Fishbein
Brianne Kucerik
Phyllis White
Qualex International

ATTACHMENT 1

SBC/California 271

SBC presentation to OGC
concerning Section 709.2 issues

November 13, 2002

Cal. Pub. Utils. Code, Section 709.2:

- Enacted on January 1, 1995, during the MFJ regime.
- The CPUC "shall authorize fully open competition" for intrastate interLATA service "if federal legislation or court action amends" the MFJ "to allow open competition in that service."
- Otherwise, the CPUC "shall order" Pacific Bell "to offer full intrastate interexchange service" and shall "seek a waiver" of MFJ restrictions.
- But the CPUC may not issue such an order until it finds that
  - all competitors have "fair, nondiscriminatory, and mutually open access" to local exchange and interexchange facilities;
  - "there is no anticompetitive behavior" by Pacific Bell, "including unfair use of subscriber information . . . or customer contacts";
  - "there is no improper cross-subsidization of intrastate interexchange service"; and
  - "there is no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets."

CPUC 709.2 Issue:

- The 709.2 part of the CPUC order found that Pacific Bell *does* provide competitors with "**fair, nondiscriminatory and mutually open access**" to the local market.
- The CPUC order stated, however, that "the record does not support the finding that there is no possibility of **anticompetitive behavior** by Pacific Bell."
  - *CPUC cited two lawsuits (from 1996 and 1997) alleging anticompetitive conduct. In one case, the relevant claims were rejected; in the other, the parties settled.*
  - *CPUC also noted that it "differ[ed] from the FCC's view" authorizing BOC joint marketing of local and long-distance services.*
- The CPUC order also stated that the record "does not support the finding that there is no possibility of improper **cross-subsidization** anywhere within Pacific's proposal to provide long distance telephone service in California."
  - *But the 1996 Act does not require a BOC to prove this negative.*
  - *Moreover, Section 272 fully addresses cross-subsidization concerns.*
- The CPUC order stated that Pacific Bell "failed to show that there is no substantial possibility of harm" to the **intrastate long-distance market**.
  - *CPUC cited joint marketing concerns arising from its policy disagreement with the FCC; Pacific Bell's proposed joint marketing plan fully complies with federal law.*
  - *Cited Pacific Bell's role in serving as the Preferred Interexchange Carrier (PIC) administrator, even though BOCs perform that role in other 271-approved states, and even though Pacific properly performs this role already as to intraLATA calls.*

Legal analysis:

- In the *Non-Accounting Safeguards Order,* the FCC determined that Sections 271 and 272 (and the FCC's implementing rules) supplant inconsistent state law addressing the *intrastate* interLATA market:
  - Ruled that "the states may not impose, with respect to BOC provision of intrastate interLATA service, requirements inconsistent with sections 271 and 272 and the Commission's rules under those provisions." ¶ 47.
  - "[R]eject[ed] the suggestion . . . that, after the Commission has granted a BOC application for authority under section 271, a state nonetheless may condition or delay BOC entry into intrastate interLATA services." *Id.*
- The peculiarities of California law have no significance for the Section 271 "public interest" inquiry:
  - The FCC's "public interest" inquiry does not, and could not sensibly, vary on the basis of differences in *state law*.
  - Instead, the FCC should consider any concerns or factual findings by the state commission, treat them the same way it would treat the concerns of any other party, and assess their significance under federal law.
  - Moreover, whereas Section 271(d)(2) directs the FCC to "consult" with state PUCs "to verify the compliance of the Bell operating company with the requirements of subsection (c)" (*i.e.,* the checklist), it does not require the FCC even to consult with the states on public interest or other *non*-checklist issues.

708.3. Whenever a business transaction of an electrical, gas, water corporation with 10,000 or more service connections, or telephone corporation is such that a personal appearance by a person is required by the corporation and the person is unable to appear at the corporation's place of business during the corporation's usual business hours, then the corporation shall provide a reasonable and convenient alternative to the person such as an appointment outside the corporation's usual business hours or allowing the person to conduct the transaction by telephone, or mail, or both.

709. The Legislature hereby finds and declares that the policies for telecommunications in California are as follows:

(a) To continue our universal service commitment by assuring the continued affordability and widespread availability of high-quality telecommunications service to all Californians.

(b) To encourage the development and deployment of new technologies and the equitable provision of services in a way which efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services.

(c) To promote economic growth, job creation, and the substantial social benefits that will result from the rapid implementation of advanced information and communications technologies by adequate long-term investment in the necessary infrastructure.

(d) To promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct.

(e) To remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice.

709.2. (a) The commission shall authorize fully open competition for intrastate interexchange telecommunications service, otherwise known as intrastate interLATA, or intrastate service between local access and transport areas, in California if federal legislation or court action amends the modification of final judgment entered by the United States District Court for the District of Columbia in United States v. Western Electric, Civil Action No. 82-0192, to allow open competition in that service.

(b) (1) If neither federal law nor court action has authorized full intrastate interexchange competition, the commission shall order the opening of all intrastate interexchange telecommunications markets to full competition, and the commission shall order, no later than October 1, 1995, all telephone corporations subject to the restrictions in the modification of final judgment to offer full intrastate interexchange service, and to seek a waiver of the interexchange telecommunications service restriction from the federal court overseeing the modification of final judgment. The service may be offered through resale and through facilities owned by the telephone corporations.

(2) If the federal district court denies the waiver request, and an appeal is taken and the federal Court of Appeals affirms the denial and refuses to remand the waiver request to the federal district court for further review, and review is sought in the United States Supreme Court and that court refuses to review or reviews and affirms the lower court decisions denying the waiver, and the commission determines that all reasonable legal recourse has been exhausted by the telephone corporation, the commission shall rescind the order.

(3) No order shall be implemented, nor services marketed by the telephone corporations until a waiver is granted or until federal

legislation or court action amends the modification of final judgment to allow open competition in intrastate interexchange telecommunications service.

(c) No commission order authorizing or directing competition in intrastate interexchange telecommunications shall be implemented until the commission has done all of the following, pursuant to the public hearing process:

(1) Determined that all competitors have fair, nondiscriminatory, and mutually open access to exchanges currently subject to the modified final judgment and interexchange facilities, including fair unbundling of exchange facilities, as prescribed in the commission's Open Access and Network Architecture Development Proceeding (I. 93-04-003 and R. 93-04-003).

(2) Determined that there is no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber information or unfair use of customer contacts generated by the local exchange telephone corporation's provision of local exchange telephone service.

(3) Determined that there is no improper cross-subsidization of intrastate interexchange telecommunications service by requiring separate accounting records to allocate costs for the provision of intrastate interexchange telecommunications service and examining the methodology of allocating those costs.

(4) Determined that there is no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets.

(d) The opening of intrastate interexchange telecommunications markets to competition pursuant to this section shall not precede, but may be coincident with, the opening of competition within the local exchange markets, as expressly authorized by the commission, subject to subdivision (c).

(e) No part of this section shall be construed as constituting a state action within the meaning of Parker v. Brown, 317 U.S. 341.

(f) No part of this section shall be construed to preempt application of the unfair practices or antitrust laws of this state.

709.5. (a) It is the intent of the Legislature that all telecommunications markets subject to commission jurisdiction be opened to competition not later than January 1, 1997. The commission shall take steps to ensure that competition in telecommunications markets is fair and that the state's universal service policy is observed.

(b) To the extent possible, competition in intraexchange telecommunications markets shall be coincident with competition in video markets.

(c) The commission shall expedite its open network architecture and network development, interconnection, universal service, and other related dockets so that whatever additional rules and regulations that may be necessary to achieve fair local exchange competition shall be in place no later than January 1, 1997.

(d) If any local exchange telephone company obtains the right to offer cable television or video dialtone service within its service territory from a regulatory body or court of competent jurisdiction, any cable television corporation or its affiliates may immediately have the right to enter into the intraexchange market within the service territory of that local exchange carrier by filing for approval of a certificate of public convenience and necessity, if necessary, which shall be expeditiously reviewed by the commission.

(e) If the local exchange corporation is subject to the commission's standards for the interconnection of networks, network unbundling, and service quality, the cable television corporation or its

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended.	)	CC Docket No. 96-149

FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 23, 1996 **Released: December 24, 1996**

Comment Date: February 19, 1997
Reply Comment Date: March 21, 1997

By the Commission:

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We therefore conclude that elimination of the proposed provision was a nonsubstantive change.[45] Based on the foregoing, we find, pursuant to the general rulemaking authority vested in the Commission by sections 4(i), 201(b), and 303(r) of the Act, and consistent with fundamental principles of administrative law, that the Commission has the requisite authority to promulgate rules implementing section 272 of the Act.

B. Scope of Commission's Authority Regarding InterLATA Services

a. Background

25. In the Notice, we tentatively concluded that the Commission's authority under sections 271 and 272 applies to intrastate and interstate interLATA services provided by BOCs or their affiliates.[46] We based this tentative conclusion in part on our analysis that Congress intended sections 271 and 272 to replace the pre-Act restrictions on the BOCs contained in the MFJ, which barred their provision of both intrastate and interstate interLATA services.[47] We also observed that the interLATA/intraLATA distinction appears to some extent to have supplanted the traditional interstate/intrastate distinction for purposes of sections 271 and 272.[48] We further noted that reading sections 271 and 272 as applying to all interLATA services fits well with the structure of the statute as a whole,[49] and that reading the sections as limited to interstate services would lead to implausible results.[50] We also indicated that we do not believe that section 2(b) of the Act precludes the conclusion that our authority under sections 271 and 272 applies to intrastate as well as interstate interLATA services.[51] Finally, we asked parties that disagreed with the foregoing analysis to comment on the extent to which the Commission may have authority to preempt state regulation with respect to some or all of the non-accounting matters addressed by sections 271 and 272.[52]

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[45] In addition, even if the removal were considered as more than inconsequential, we believe that the most plausible explanation is that Congress found such a specification unnecessary in light of sections 4(i), 201(b), 303(r), and long-standing principles of administrative law.

[46] Notice at ¶ 25.

[47] Id. at ¶ 21.

[48] Id. at ¶ 22.

[49] Id. at ¶ 23.

[50] Id. at ¶ 25.

[51] Id. at ¶ 26.

[52] Id. at ¶ 28.

b. Comments

26. Many parties, including BellSouth, PacTel, USTA and the New York Commission, agree that sections 271 and 272 cover both intrastate and interstate services.[53] DOJ, BellSouth, and AT&T maintain that the Act, by its terms, explicitly covers intrastate interLATA services and thus, grants the Commission authority over intrastate interLATA services for purposes of sections 271 and 272.[54] DOJ and AT&T argue that, because the grant is explicit, section 2(b) does not bar the Commission from adopting rules that apply to the provision of intrastate interLATA services.[55] These and other parties generally argue, as a separate basis for finding that sections 271 and 272 extend to both intrastate and interstate interLATA services, that Congress intended for the Act to replace the MFJ.[56] These parties contend that, since the MFJ restrictions applied to the BOCs' provision of both intrastate and interstate interLATA services, Congress intended for sections 271 and 272 to apply to the BOCs' provision of both types of services as well.[57] Indeed, several of these parties maintain that interpreting sections 271 and 272 as covering both intrastate and interstate interLATA services is the only reasonable interpretation.[58] Several parties further maintain that section 2(b) of the Act does not affect this analysis.[59]

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[53] DOJ Reply at 4-7; New York Commission at 2-3 (but arguing that the Commission lacks authority to establish rules applicable to intrastate interLATA services); BellSouth at 15; PacTel at 3 (maintaining, however, that "Congress did not give the FCC plenary authority over those services to implement any and all regulations and safeguards whatsoever."); USTA at 7 (but arguing that section 272 is self-executing); AT&T at 8; AT&T Reply at 3-4; Sprint at 9-10; Sprint Reply at 4; MCI at 3; MCI Reply at 3-4; Excel at 11; CompTel at 3-6; TRA at 5-6; ITAA at 5-7.

[54] DOJ Reply at 4-5 (arguing that the Act's definitions of the terms "LATA," and "interLATA" include intrastate services); AT&T at 8 (arguing that the Act's definition of the term "interLATA" applies to both intrastate and interstate services so long as they cross a LATA boundary); BellSouth at 15-16 (stating that "[t]he explicit grants of FCC jurisdiction in Sections 271 and 272 override the generic restrictions on FCC jurisdiction in Section 2(b)," but arguing that "these exemptions must be narrowly construed in order to preserve the meaning of 2(b)"); see also CompTel at 4, 5 (stating that "[p]ursuant to the MFJ, LATAs were defined based 'upon a city or other identifiable community or interest,' without limitation by state boundaries. Because a single state may contain more than one LATA, interLATA communications may be intrastate as well as interstate in nature." (footnote omitted)).

[55] DOJ Reply at 6-7; AT&T at 8-9.

[56] New York Commission at 2-4 (maintaining, however, that the Commission lacks authority to establish rules applicable to intrastate interLATA services); BellSouth at 15; USTA at 7; DOJ Reply at 5-6; AT&T at 8 n.7; MCI at 3; Excel at 11; CompTel at 5-6; TRA at 5-6; ITAA at 5-7.

[57] New York Commission at 2-4 (maintaining, however, that the Commission lacks authority to establish rules applicable to intrastate interLATA services); BellSouth at 15; USTA at 7; AT&T at 8 n.7; DOJ Reply at 5-6; MCI at 3; Excel at 11; CompTel at 5-6; TRA at 5-6; ITAA at 5-7.

[58] DOJ Reply at 7; MCI at 5; MCI Reply at 3-4; Excel at 11; ITAA at 5-6; CompTel at 5-6.

[59] AT&T at 8-9; Sprint Reply at 5; MCI at 5; TRA at 6-7; see also DOJ Reply at 6-7.

27. State representatives and some of the BOCs, however, challenge our tentative conclusion that sections 271 and 272 give the Commission authority over intrastate interLATA services.[60] These parties argue that sections 2(b) and 601(c) of the Act bar the Commission from exercising authority under sections 271 and 272 to establish rules applicable to intrastate services.[61] Although the New York Commission agrees with our tentative view that the term "interLATA" covers both intrastate and interstate services,[62] other parties objecting to our reading of the scope of sections 271 and 272 generally do not address the issue of whether the term "interLATA services" as used in the Act or the MFJ includes intrastate interLATA services. Instead, they appear to contend that, even if the term "interLATA services" includes both intrastate and interstate services, section 2(b) precludes the Commission from establishing rules applicable to intrastate interLATA services.[63] According to these parties, states have authority to establish rules to govern the BOCs' provision of intrastate interLATA services,[64] and it is premature for the Commission at this time to preempt states from exercising that authority.[65] NARUC and the Missouri Commission claim that the legislative history shows that Congress intended to limit the Commission's authority under sections 271 and 272 to interstate services. In support of this claim, these parties point to the fact that the House and Senate versions of the pre-conference bill exempted sections 271 and 272 from section 2(b), but those exemptions were removed in the final legislation.[66]

28. Parties opposing our tentative conclusions also argue that, although the MFJ restrictions on the BOCs applied to both interstate and intrastate interLATA services, the states retained authority to regulate a BOC's intrastate interLATA services when such services were authorized by the MFJ Court.[67] They assert, therefore, that, even if sections 271 and 272 apply to intrastate services, those provisions would not divest the states of authority over intrastate

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[60] Bell Atlantic at 3; BellSouth at 15-17; California Commission at 2-9; Missouri Commission at 3; New York Commission at 2-6; Ohio Commission at 2-5; Wisconsin Commission Reply at 3-11; NARUC at 4-7.

[61] Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 3; New York Commission at 3-5; Ohio Commission at 2; Wisconsin Commission Reply at 3; NARUC at 7.

[62] New York Commission at 2-3.

[63] Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2; NARUC at 7; see Wisconsin Commission Reply at 2, 6-8.

[64] BellSouth at 15-17; California Commission at 5-6, 9; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2-5; Wisconsin Commission Reply at 3-5, 6-11; NARUC at 5-7.

[65] New York Commission at 5-6; Wisconsin Commission Reply at 5-6; NARUC at 4-5.

[66] NARUC at 7; Missouri Commission at 3; see also Bell Atlantic at 3.

[67] California Commission at 3-4; Missouri Commission at 2; New York Commission at 3-4; NARUC at 6.

services,[68] and that the Commission's authority, if it exists, under sections 271 and 272, is not plenary.[69]

29. None of the parties opposing our reading of the scope of sections 271 and 272 contends that the Commission's authority under section 271(d) to authorize BOC entry into in-region interLATA services does not extend to BOC provision of intrastate interLATA services. The Wisconsin Commission argues, however, that "a state might decide that, for intrastate interLATA purposes, BOC (or affiliate) entry into intrastate interLATA markets should be delayed subject to satisfaction of previously-made infrastructure investment commitments, needed quality of service improvements, universal service obligations, or some other factor for which delayed or conditioned entry into intrastate interLATA markets is appropriate leverage exercised in the public interest."[70]

3. Discussion

30. For the reasons set forth below, we conclude that sections 271 and 272, and the Commission's authority thereunder, apply to intrastate as well as interstate interLATA services provided by the BOCs or their affiliates. We base this conclusion on the scope of the pre-1996 Act MFJ restrictions on the BOCs' provision of interLATA services, as well as on the plain language of sections 271 and 272, and the requirements of those sections. In addition, we find that section 2(b) does not bar the Commission from establishing regulations to clarify and implement the requirements of section 272 that apply to intrastate interLATA services and other intrastate matters that are within the scope of section 272. We hold, therefore, that the rules we establish to implement section 272 are binding on the states, and the states may not impose regulations with respect to BOC provision of intrastate interLATA service that are inconsistent with section 272 and the Commission's rules under section 272. We emphasize, however, that the scope of the Commission's authority under sections 271 and 272 extends only to matters covered by those sections. Those sections do not alter the jurisdictional division of authority with respect to matters falling outside their scope. For example, rates charged to end users for intrastate interLATA service have traditionally been subject to state authority, and will continue to be.

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[68] California Commission at 3; Missouri Commission at 2; New York Commission at 3; Ohio Commission at 2; Wisconsin Commission Reply at 4; NARUC at 5-7.

[69] BellSouth at 15; PacTel at 3. BellSouth and PacTel argue that Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services. BellSouth at 15; PacTel at 3.

[70] Wisconsin Commission Reply at 7.

31. We stated in the Notice, and several parties agree, that section 601(a) of the 1996 Act indicates that Congress intended the provisions of the Act to supplant the MFJ.[71] That section provides:

> Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the [MFJ] shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by [the MFJ].[72]

No party challenges the fact that the MFJ generally prohibited the BOCs and their affiliates from providing any interLATA services -- interstate or intrastate.[73] Moreover, no party challenges the fact that the term "interLATA services" as used in the MFJ referred to both intrastate and interstate services.[74]

32. Similarly, with respect to the term "interLATA services" as used in sections 271 and 272, the DOJ, AT&T, and BellSouth maintain that, because the Act defines the term "interLATA" to include intrastate services, references in sections 271 and 272 to interLATA services apply to both intrastate and interstate services. We agree.

33. The Act defines "interLATA service" as "telecommunications between a point in a local access and transport area and a point located outside such area."[75] The Act further defines the term "LATA" as "a contiguous geographic area . . . established before the date of enactment of the [1996 Act] by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the [MFJ]" or subsequently modified with approval of the

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[71] Notice at ¶ 21; DOJ Reply at 5-6; New York Commission at 2-4 (maintaining, however, that the Commission lacks authority to establish rules applicable to intrastate interLATA services); Missouri Commission at 2 (but arguing that states still retain jurisdiction, as they did under the MFJ); BellSouth at 15-16 (stating that "the FCC unquestionably has authority to entertain and act upon Section 271 applications for BOC interLATA entry, whether interstate or intrastate;" but asserting that "Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services"); AT&T at 8 n.7; Excel at 11; CompTel at 5-6; TRA at 5-6; ITAA Comments at 5.

[72] 1996 Act, § 601(a), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

[73] See United States v. Western Electric Co., 552 F. Supp. 131, 227 (D.D.C. 1982) (subsequent history omitted).

[74] See id., 552 F. Supp. at 229 (defining "exchange area" and "interexchange telecommunications"); United States v. Western Electric Co., 569 F. Supp. 990, 993 (D.D.C. 1983) (explaining that the term "local access and transport area" was being used as a replacement for "exchange area") (subsequent history omitted).

[75] 47 U.S.C. § 153(21).

Commission.[76] This definition expressly recognizes that a LATA may comprise an area, such as a metropolitan statistical area, that is smaller than a state.[77] Indeed, the DOJ notes that most LATAs established by the MFJ consist of only parts of individual states; only nine LATAs out of a total of 158 encompass an entire state.[78] Thus, by defining an interLATA service as telecommunications from a point inside a LATA to a point outside a LATA, the Act expressly recognizes that interLATA services may include telecommunications between two LATAs within a single state. Accordingly, we find that the term "interLATA services," as used in sections 271 and 272, expressly refers to both intrastate and interstate services.

34. Although the term "interLATA services" as used in the MFJ and in sections 271 and 272 refers to both interstate and intrastate interLATA services, the New York Commission and others assert that, when Congress transferred responsibility for enforcing the prohibition on the BOCs' provision of interLATA services from the U.S. District Court to the Commission, it intended to limit our authority only to interstate interLATA services.[79] To the contrary, we find that reading sections 271 and 272 as granting the Commission authority over intrastate as well as interstate interLATA services is consistent with, and indeed necessary to effectuate, Congress's intent that sections 271 and 272 replace the restrictions of the MFJ with respect to BOC provision of interLATA services.

35. The jurisdictional limitation that the New York Commission and others seek to read into sections 271 and 272 would lead to implausible results. Specifically, under that statutory interpretation, the BOCs would have been permitted to provide in-region, intrastate, interLATA services upon enactment, without complying with the section 271 entry requirements or the section 272 safeguards, and subject only to any existing, generally applicable state rules on interexchange entry. Any such rules, presumably, would not have been specifically directed at BOC entry, because of the long-standing MFJ prohibition on entry. Because concerns about BOC control of bottleneck facilities needed for the provision of in-region interLATA services are applicable to both interstate and intrastate services, it seems clear that sections 271 and 272 apply equally to the BOCs' provision of both intrastate and interstate, in-region, interLATA services. We find no reasonable basis for concluding that Congress intended to lift the MFJ's ban on BOC provision of intrastate interLATA services, which constitute approximately 30 percent of interLATA traffic, and permit the BOCs to offer such services before satisfying the requirements

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[76] 47 U.S.C. § 153(25). As the court stated, "simply put, [a Standard Metropolitan Statistical Area] is a U.S. Department of Commerce designation that includes a city and its suburbs. United States v. Western Electric Co., 569 F.Supp. at 993, n.8.

[77] States served by a BOC with only one LATA are: Delaware, Maine, New Hampshire, New Mexico, Rhode Island, South Dakota, Utah, Vermont, and Wyoming. The District of Columbia is covered entirely by one LATA that also covers portions of southern Maryland and northern Virginia. DOJ Reply at 6 n.4.

[78] DOJ Reply at 6.

[79] See Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2; Wisconsin Commission Reply at 3-4; NARUC at 5-7.

of sections 271 and 272.[80] As the DOJ notes, "Congress could not have intended, for example, to open up the intrastate interLATA market immediately for BOC entry, without the carefully-devised entry requirements of Section 271, while at the same time establishing those requirements with respect to interstate interLATA entry. Nor could Congress have meant to defeat the safeguards carefully imposed under Section 272 by permitting the BOCs to engage in the behavior which Section 272 prohibits, as long as they do it within the individual states."[81] Indeed, we find it significant that neither the states nor the BOCs have argued that such a result was intended. In light of this analysis, we find that the Commission's authority under sections 271 and 272 extends to both intrastate and interstate interLATA services.

36. Similarly, several parties support the conclusion that our authority to consider the applications of BOCs seeking to provide in-region interLATA service pursuant to section 271(d) applies to both interstate and intrastate services.[82] None of the state representatives and BOCs commenting on this issue claims that the Commission's authority under section 271(d) does not apply to a BOC's provision of intrastate interLATA services. Despite the lack of controversy on this point, several commenters claim that rules adopted under section 272 apply only to interstate services.[83] We believe that the requirements of sections 271 and 272 repudiate this argument. In granting an application under section 271(d), the Commission must determine, among other things, that the BOC meets the requirements of section 271(d)(3)(B). Under this provision, the Commission must find that the requested authorization "will be carried out in accordance with the requirements of section 272."[84] In light of the Commission's authority to approve entry into both intrastate and interstate in-region interLATA service, pursuant to section 271, it seems logical and necessary that the Commission's authority to impose safeguards established by section 272, should similarly extend to both intrastate and interstate interLATA service.

37. Several parties have argued that, although the MFJ restrictions on the BOCs applied to both interstate and intrastate interLATA services, the states retained authority to regulate a BOC's intrastate interLATA services when such services were authorized by the MFJ court. They assert, therefore, that, even if sections 271 and 272 apply to intrastate services, those

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[80] See Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Table 6 (Com. Car. Bur. Feb. 1996).

[81] DOJ Reply at 7.

[82] DOJ Reply at 4-7; New York Commission at 2 (maintaining, however, that the Commission lacks authority to establish rules regarding intrastate services); AT&T at 8; AT&T Reply at 3-5; MCI at 3; MCI Reply at 3-4; Sprint at 9-10; Sprint Reply at 4; USTA at 7 (but arguing that section 272 is self-implementing); Excel at 11; CompTel at 3-4; TRA at 5-6; ITAA at 5-7; BellSouth at 15 (maintaining, however, that Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services); PacTel at 3.

[83] Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2; NARUC at 7; see Wisconsin Commission Reply at 2, 6-8.

[84] 47 U.S.C. §271(d)(3).

provisions would not divest the states of authority over intrastate services. As we stated at the outset of this discussion, the scope of the Commission's authority under sections 271 and 272 extends only to matters covered by those sections, i.e., authorization for BOC entry into in-region interLATA service and the safeguards imposed in section 272. We do not dispute that the states retain their authority to regulate intrastate services in other contexts.

38. We further find that the requirements of sections 271 and 272 buttress our conclusions regarding the scope of the Commission's jurisdiction. For example, we find it significant that section 271(h) directs the Commission to address intrastate matters relating to BOC provision of incidental interLATA services. That section states that "[t]he Commission shall ensure that the provision of [incidental interLATA services] by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."[85] Telephone exchange service is primarily an intrastate service. This reference to a plainly intrastate service indicates that the scope of section 271 encompasses intrastate matters, and thus the Commission's authority thereunder applies to both intrastate and interstate interLATA services.

39. State representatives and some BOCs argue that sections 2(b) and 601(c) of the Act preserve the states' authority to adopt rules regarding BOC provision of intrastate interLATA services. They argue that section 2(b) bars the Commission from exercising authority under sections 271 and 272 to establish rules applicable to intrastate interLATA services.[86] For the reasons set forth below, we find that section 2(b) does not preclude us from finding that sections 271 and 272, and our authority to promulgate rules thereunder, apply to BOC provision of intrastate interLATA services.

40. In Louisiana Public Service Commission v. Federal Communications Commission, the Supreme Court determined that, in order to overcome section 2(b)'s limits on the Commission's jurisdiction with respect to intrastate communications service, Congress must either modify section 2(b) or grant the Commission additional authority.[87] As explained above, we find that the term "interLATA services," by the Act's own definition, includes intrastate services, and that Congress, in sections 271 and 272, expressly granted the Commission authority over intrastate interLATA services for purposes of those sections. Accordingly, consistent with the

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[85] Id. § 271(h) (emphasis added).

[86] As noted above, with the exception of the New York Commission, the parties challenging the Commission's authority to preempt state regulation do not address the issue of whether the term "interLATA services" should be interpreted -- by definition or otherwise -- to include both intrastate as well as interstate services.

[87] Louisiana Public Service Comm'n v. Fed. Communications Comm'n, 476 U.S. 355, 377 (1986). Section 2(b) provides that, except as provided in certain enumerated sections [not including sections 271 and 272], "nothing in [the Communications Act] shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier." 47 U.S.C. § 152(b).

Court's statement in Louisiana, we find that section 2(b) does not limit our authority over intrastate interLATA services under sections 271 and 272.

41. In addition, we find that, in enacting sections 271 and 272 after section 2(b), and squarely addressing therein the issues before us, Congress intended for sections 271 and 272 to take precedence over any contrary implications based on section 2(b).[88] In construing these provisions, we are mindful that "it is a commonplace of statutory construction that the specific governs the general."[89] Moreover, where amended and original sections of a statute cannot be harmonized, the new provisions should be construed to prevail as the latest declaration of legislative will.[90] We find also that, in enacting the 1996 Act, there are other instances where Congress indisputably gave the Commission intrastate jurisdiction without amending section 2(b). For instance, section 251(e)(1) provides that "[t]he Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States."[91] Section 253 directs the Commission to preempt state regulations that prohibit the ability to provide intrastate services. Section 276(b) directs the Commission to "establish a per call compensation plan to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call."[92] Section 276(c) provides that, "[t]o the extent that any State [payphone] requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."[93] None of these provisions is specifically excepted from section 2(b), yet *all* of them explicitly give the Commission jurisdiction over intrastate matters. Thus, we find that the lack of an explicit exception in section 2(b) does not require us to conclude that the Commission's jurisdiction under sections 271 and 272 is limited to interstate services. A contrary holding would nullify several explicit grants of authority to the Commission, noted above, and would render substantial parts of the statute meaningless. Thus, in this instance, we believe that the lack of an explicit exception in section 2(b) is not dispositive of the scope of the Commission's jurisdiction.

42. Moreover, as stated above, with the exception of the New York Commission, the parties challenging the Commission's authority to preempt state regulation under sections 272 do not address the issue of whether "interLATA services" are defined by the Act to include intrastate services. The New York Commission agrees with us that it does. These parties (including the New York Commission) also do not challenge the proposition that Congress vested in the

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[88] See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

[89] Morales v. Trans World Airlines, Inc., 504 U.S. at 384.

[90] 2 J. Sutherland, Statutory Construction § 22.34 (6th ed.); see also American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196, 200 (2nd Cir. 1974).

[91] 47 U.S.C. § 251(e)(1).

[92] Id. § 276(b).

[93] Id. § 276(c).

Commission authority over BOC entry into all in-region interLATA services -- intrastate and interstate. We find it difficult to reconcile these parties' silence on these issues, as well as the New York Commission's agreement that "interLATA services" includes intrastate services, with their position that section 2(b) limits the application of the Commission's implementing rules under section 272 to interstate interLATA services. If, as it remains undisputed in the record, the Commission would necessarily determine, in assessing whether to allow BOC entry into in-region interLATA services, whether a BOC's provision of intrastate as well as interstate interLATA services complies with section 272, we can find no basis to maintain that the Commission's authority under sections 271 and 272 does not include authority to apply its interpretation of section 272 to all of the interLATA services -- intrastate and interstate -- at issue in the BOC's 271 in-region interLATA services application.

43. NARUC and the Missouri Commission stress that earlier drafts of the legislation would have amended section 2(b) to make an exception for certain sections of Title II, including sections 271 and 272, but the enacted version did not include that exception. They argue that this change demonstrates that Congress intended that section 2(b)'s limitations remain fully in force with regard to sections 271 and 272. We find this argument unpersuasive.

44. As noted above, parties that attach significance to the omission of the proposed amendment of section 2(b) rely on a rule of statutory construction providing that, when a provision in a prior draft is altered in the final legislation, Congress intended a change from the prior version. This rule of statutory construction has been rejected, however, when changes from one draft to another are not explained.[94] In this instance, the only statement from Congress regarding the meaning of the omission of the section 2(b) amendment appears in the Joint Explanatory Statement. According to the Joint Explanatory Statement, all differences between the Senate Bill, the House Amendment, and the substitute reached in conference are noted therein "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes."[95] Because the Joint Explanatory Statement did not address the removal of the section 2(b) amendment from the final bill, the logical inference is that Congress regarded the change as an inconsequential modification rather than a significant alteration. It seems implausible that, by enacting the final version, Congress intended a radical alteration of the Commission's authority under sections 271 and 272, given the total lack of legislative history to that effect. Based on the foregoing, we conclude that elimination of the proposed amendment of section 2(b) was a nonsubstantive change.

45. Moreover, even if it were appropriate to speculate as to the meaning of the omission of the section 2(b) exception, we disagree with the argument that the omission necessarily indicates that Congress intended not to provide the Commission authority over

[94] Mead Corp v. Tilley, 490 U.S. at 723; Rastelli v. Warden, 782 F.2d at 23; Drummond Coal v. Watt, 735 F.2d at 474.

[95] Joint Explanatory Statement at 113.

intrastate services in sections 271 and 272. We find it is equally possible that Congress omitted the exception based on an understanding that the use of the term interLATA in sections 271 and 272 established a clear grant of authority over intrastate services and therefore that such an exception was unnecessary.

46. We similarly are not persuaded that section 601(c) of the 1996 Act evinces an intent by Congress to preserve states' authority over intrastate matters. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[96] As explained above, we conclude that sections 271 and 272, which apply to interLATA services, were expressly intended to modify federal and state law and jurisdictional authority.

47. For all of the reasons discussed above, we conclude that sections 271 and 272, and the Commission's authority thereunder, apply to intrastate and interstate interLATA services provided by the BOCs or their affiliates. We hold, therefore, that the rules we establish to implement section 272 are binding on the states, and the states may not impose, with respect to BOC provision of intrastate interLATA service, requirements inconsistent with sections 271 and 272 and the Commission's rules under those provisions. In this regard, based on what we find is clear congressional intent that the Commission is authorized to make determinations regarding BOC entry into interLATA services, we reject the suggestion by the Wisconsin Commission that, after the Commission has granted a BOC application for authority under section 271, a state nonetheless may condition or delay BOC entry into intrastate interLATA services.[97]

C. Scope of Commission's Authority Regarding Manufacturing Services

48. In the Notice, we tentatively concluded that the Commission's authority under section 272 extends to all BOC manufacturing of telecommunications equipment and CPE. Only two parties, Sprint and TIA, commented on this issue, and both agreed with our tentative conclusion.

49. We adopt our tentative conclusion that our authority under section 272 extends to all BOC manufacturing of telecommunications equipment and CPE. As we stated in the Notice, to the extent that sections 271 and 272 address BOC manufacturing activities, we believe that the same statutory analysis set forth above with respect to interLATA services would apply. We see no basis for distinguishing among the various subsections of sections 271 and 272. Even apart from that analysis, however, we believe that the provisions concerning manufacturing clearly apply to all manufacturing activities. Section 2(b) of the Communications Act limits the

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[96] 1996 Act, § 601(c)(1), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

[97] We note that a state would retain authority to enforce obligations relating to a BOC's provision of intrastate interLATA service, such as those identified by the Wisconsin Commission, through mechanisms other than denial or delayed of entry into the intrastate interLATA market.

STATE CAPITOL
SACRAMENTO, CA 95814
(916) 445-3641

2550 MARIPOSA MALL
SUITE 2016
FRESNO, CA 93721
(559) 264-3078

901 TOWER WAY
SUITE 202
BAKERSFIELD, CA 93309
(661) 323-0442

California State Senate

SENATOR
JIM COSTA
SIXTEENTH SENATORIAL DISTRICT

COMMITTEES
CHAIRMAN
COMMITTEE ON AGRICULTURE & WATER RESOURCES
MEMBER
FINANCE, INVESTMENT & INTERNATIONAL TRADE
HOUSING & COMMUNITY DEVELOPMENT
TRANSPORTATION
CALIFORNIA WORLD TRADE COMMISSION

October 18, 2002

Federal Communications Commission
C/o Marlene H. Dortch, Commission Secretary
445 12th Street SW
CY-B402
Washington DC 20554

RECEIVED
OCT 21 2002
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: FCC Docket No. 02-306

Dear Commissioners:

I understand that the Federal Communications Commission (FCC) is currently reviewing Pacific Bell's application to enter the long distance market in California. I further understand that some parties filing comments have suggested that Section 709.2 of the California Public Utilities Code and the federal statutory requirements for long distance relief are mutually exclusive. In other words, they have suggested that Section 709.2 should act as a bar to Pacific Bell being granted long distance authority by the FCC. As I was the author of Section 709.2 while a member of the California State Assembly, I am writing to clarify that this legislation was in no way intended to stand as a barrier to FCC approval of Pacific Bell's long distance application. As I discuss below, if the FCC concludes that Pacific Bell meets the federal statutory requirements for relief, then the company meets the requirements of Section 709.2 and I would strongly urge the FCC to approve Pacific Bell's application.

By way of background, Assembly Bill 3720 was the vehicle I authored that enacted Section 709.2 on January 1, 1995. At that time, the local market was not open to competition and Pacific Bell was prohibited from providing long distance because of a federal district court order known as the Modification of Final Judgment or MFJ. The purpose in drafting AB 3720 was to provide a framework by which the telecommunication marketplace in California would become more competitive. Simply stated, if Pacific Bell opened the local market to competition and there was no evidence of anticompetitive behavior or cross-subsidization that would hurt the other long distance carriers, then the California Public Utilities Commission could support Pacific Bell's entry into the long distance market through an MFJ waiver obtained from the federal court.

Everything changed, however, when the Telecommunications Act of 1996 (the Act) was passed by Congress and signed into law by President Clinton. The Act superceded the MFJ, provided a comprehensive federal statutory and regulatory scheme for opening the local telephone marketplace to competition, and established a detailed set of requirements that Pacific Bell would have to meet in order to provide long distance service. The federal requirements closely mirror AB 3720. In each case, the applicant is required to demonstrate open access to its

network, compliance with restrictions against improper cross-subsidization or anti-competitive behavior, and that entry into the long-distance market would be in the public interest. In light of the detailed and comprehensive requirements that have been established at the federal level, clearly, any applicant that meets the federal test more than satisfies AB 3720.

Put another way, it would be unequivocally contrary to the intent of AB 3720 to somehow use Section 709.2 as a barrier to FCC approval of a Pacific Bell 271 application that complies with the requirements of the federal Act.

I appreciate your consideration of my views on this matter.

Sincerely,

JIM COSTA
Member of the Senate
16th District

JC:tr

ATTACHMENT 2

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

THURSDAY, SEPTEMBER 19, 2002

SAN FRANCISCO, CALIFORNIA

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ITEMS H-7, H-7a AND 1

--ooo--

APPEARANCES:

PRESIDENT LORETTA M. LYNCH, PRESIDENT

COMMISSIONERS: GEOFFREY F. BROWN, HENRY M. DUQUE, MICHAEL R. PEEVEY AND CARL W. WOOD

--ooo--

P R O C E E D I N G S

THURSDAY, SEPTEMBER 19, 2002

* * * *

COMMISSIONER BROWN: It reads at the present time, "Pacific Proposed Joint Marketing Plans also proposed a substantial possibility of harm to the intrastate long distance telephone market."

There was a deletion run through that. That deletion is now eliminated. So, that language is restored.

The marketing restraints and what we adopt herein are sufficient to protect consumers and competitors from potential joint marketing abuses.

So, that's -- excuse me. That's a conclusion of law, not a finding of fact.

Okay. Well, we've reached kind of an historic moment.

This was a case that was given to me by Commissioner Lynch when I didn't know anything better. I was two weeks in the job and I undertook it, thinking that it would just be a little case that

would go away in short time.

But today what we do is we take a major step in the California economy, telecommunications economy.

What we do is we pass on an evaluation, an assessment to the Federal Communications Commission about compliance with Section 271.

I think a little history is in order. The Telecommunications Act 1996 represented an effort to provide some sort of guidance to the marketplace after the breakup of the Bell monopoly and under the Telecommunications Act, there was this grand vision that was put forth. It was a vision that was going to promote competition, both in local and long distance telephone service.

The incumbents, the local incumbents, would be authorized to enter, provided that they meet certain conditions which I will address in a few minutes, would be able to enter long distance service. Previously, they were restricted to their state local calling areas.

In addition to that, long distance carriers are competitors, not ... and competitors. Some of

them were long distance, not all of them -- would be able to enter the local market and compete for the local business with -- compete against the local monopolies.

Now, this trade-off, so to speak, of course, came at quite a price. In other words, the local monopolies were to allow the competitors -- first time in the history of American capitalism -- the use of their network.

They were supposed to open their network when on a nondiscriminatory basis and we'll discuss it at a greater length in a minute, and those competitors were thereby allowed to not only use it but compete against the people that were providing that whole service.

For example, you would have an operational support system. An operational support system would be a support system where the competitors could put their orders for provision of service through the local incumbent and the incumbent would, in effect, make sure that that changed, that change of an order went through.

For example, if I wanted to switch from

Pacific Bell to AT&T as a local provider, Pacific Bell would take my order and make sure that that order was, in fact, carried out. That was what we called the "operation support system".

Also, it effected billings. Billings would go through that system and, hopefully, be carried out.

In addition to that, the Bell system, the local Bell systems, would allow the competitors to come in and co-locate on their facility, bring their switching instruments into their buildings and actually rent the space from the local monopoly and you would see other things we'll go through in a minute but the idea was that this network the great peers had built up over a period of many decades would be available to the competitors on a nondiscriminatory basis.

And if a company complied with the checklist that we have here under 271 of the Telecommunications Act, if that company did that -- if it complied, I mean, was nondiscriminatory and opened that network, what would in effect would take place would be that they would be allowed, hopefully, to go into long distance marketing.

So that there was a condition and that was part of the grand bargain.

Now, Congress, as I said, set forth a series of conditions. They're contained within 271. They're checklist items, fourteen checklist items which a local incumbent has to be measured against and, eventually, at some point a state commission is supposed to investigate and consult with the Federal Communications Commission which had ultimate authority to pass on whether or not a local monopoly went into long distance marketing; pass on after the state had consulted with -- the state commissions were supposed to provide background information; were supposed to evaluate compliance with those fourteen checklist items.

And that is what we have done today. What we have done today is we have, in effect, a report that we are about to submit if the Commission authorizes it an assessment to the Federal Communications Commission so that they can evaluate whether PacBell is suitable for long distance service.

Now, these state commissions like the Public Utilities Commission have, really, not only

acted as consultants but they have acted as kind of a scrape because the Federal Communications Commission has really not been in favor of companies, local telephone companies, coming and asking for long distance service without some approval process from the State Commission.

So, what we do today is the first step. It's kind of like a probable cause hearing. We say whether or not PacBell is ready and then the FCC will ultimately decide.

Now, after four years of investigation, after four years of enormous changes within the local system, after four years of probably the most arduous litigation I have ever seen, we're about to make a decision and that decision is embodied in my alternate and Judge Jackie Reed's proposed decision and those proposed orders, as they are, say that the Pacific Bell has substantially complied with the fourteen checklist items; has lived up to twelve out of fourteen of those items; has passed well on twelve and that there are two remaining items which are still undone, which still need to be satisfied but we feel that there has been enough compliance that we can

forward our assessment to the FCC and I will discuss the items that they passed on and the items that they didn't.

In this order, we do something else, too. We address our own state law. We have a state law that said it annotated that came before the Telecommunications Act that said if a local Bell company here in California wanted to go into InterLATA in-state long distance service, in other words, calling from San Francisco to Los Angeles, that what would have to happen is that there would be compliance with four checklist items of our own and what we did is we have found today in these decisions that Pacific Bell has passed one of them and is deficient in three of them and I will go through them.

So, we will deny, we will deny by this order PacBell's motion to be allowed to go into intrastate InterLATA long distance service. That's what we will do at this time.

Now, let's go through some of the fourteen. I won't go through all of them in detail, but I think it's important just to address some of the others, just give you a picture of how this particular company

opened its network on a nondiscriminatory basis to competitors.

First of all, the first check list is that there should be interconnection available to the competitors.

That's a physical linkage of facilities and equipment for a mutual exchange of traffic, for example, trunking and co-location.

Now, here, there was abundant evidence that Pacific had complied with this particular checklist item.

If you go to Pacific facilities, you will see that co-location. You will see that trunking. As I said, it's almost unprecedented in American capitalism.

And then the second checklist item was the opening of the unbundled network elements. In other words, there were various things that were required to be broken down of that network that were to be available to the competitors.

For example, as I said, the operation support system, what that working? That's the first thing that we asked ourselves and we found after years

of going through that tedious process that there was now an ability by the competitors to provision their service request and their bills through Pacific system.

Pricing, we talked about pricing. Are these unbundled network elements that we were just talking about in Item No. 6, are they priced reasonably?

What is Pacific supposed to do? They're supposed to price those unbundled network elements against the competitors at rates that are almost wholesale.

I mean, they're allowed to have a reasonable profit but very low so that the prices do not represent a barrier to competition and I think, as you remember, those of you that were in this Commission a few months ago, this Commission took it upon itself to reduce the price of UNE prices, unbundled network elements, to unprecedented levels among the lowest in the United States to eliminate those barriers because that was the one thing at the end of this process that competitors were saying to me.

"If only the prices could be reduced, we'd feel that we can, you know, the circumstances for competition will be complete."

Now, there were other things. There were other things on the checklist.

There had to be access to poles and conduits and right-of-ways. There had to be unbundled local loops. There had to be unbundled local transport; unbundled local switch; access to the directory services the competitors were supposed to have; access to the same directory service that Pacific had; access to telephone numbers; access to databases and associated signaling and local dialing parity; and, finally, reciprocal compensation.

There were a couple that were not complied with, as I said. For example, portability.

The ability of a customer to change his phone carrier, go from Pacific, say, to AT&T or MCI or some other company without losing that telephone number. That had to be complied with.

Now, that has not been fully tested and before the FCC rules on this, it probably should be because it -- Pacific says that it's going to finally

test portability but this particular condition will soon have to be reconciled.

The other thing is that, resale, another item that they missed on was resale.

What they're supposed to do was they're supposed to sell at wholesale price to competitors services that they retail to ordinary customers.

Now, Pacific does do an enormous amount of resales. I think Judge Reed in her opinion said that there's over three hundred thousand lines in California of resale to Silex's (phonetics) but there was one area that they were not really satisfactory in the mind of Judge Reed and in the mind of myself who wrote the alternate decision and that was in advance services, DSL and Internet services.

Pacific has contended, rightly or wrongly, and it's probably something that the FCC is going to have to ultimately resolve but those advance services are not subject to 271.

They contend also that those advanced services are provided by an affiliate, not by themselves. As a consequence, they don't have to offer them at wholesale prices.

Whether they're right or wrong is probably something that the FCC is going to have to rule on.

But, aside from these deficiencies, Pacific, as I said, has gone to enormous lengths to warrant long distance services.

It has kept its end of the bargain and most of the Silex do not complain that those competitive barriers now exist.

I remember, for example, each one of the Silexes that use the facilities of Pacific Bell coming to me and saying, "look, you take UNE prices down to the level of Commissioner Lynch's alternate and what we'll do is we'll enter the market" and one after another said that.

Some promised me that they would even drop their objection to 271 but all of them said that this was the major remaining obstacle to full competition.

Well, we've done that. So, the only thing now that we have faced are a couple of issues on the checklist items and periodic complaints about the operation of the OSS.

How do we know Pacific will comply and how do we know pacific has complied?

Do you know how we know? Because we have performance measures. We have hundreds of performance measures that are backed up with financial penalties that if they don't comply, they automatically incur financial penalties and those are going to remain for the foreseeable future.

Those will tell us whether or not there's some backsliding from the standards set forth in the checklist item.

Okay. Now, let me turn to probably the more difficult part of this presentation and that is the section on our own statute, Section 709.2 of our Public Utilities Code.

California, as I said, has its own statute relating to intrastate long distance service.

709 was enacted two years before the Telecommunications Act and the PUC under 709 is to make a determination of four points before Pacific is to be permitted into in-state long distance service.

Now, I'll go through them just briefly. First of all, there has to be a determination that the competitors have a fair nondiscriminatory access to the exchange.

Two, that there's no anti-competitive behavior by the local exchange carrier, including unfair use of subscriber contacts generated by the provision of local exchange telephone service.

Three, that there is no proper/improper cross-subsidization of the inter-exchanged telephone service; and

Four, that there is no substantial possibility to competitive intrastate telecommunication markets.

Now, mindful of that the state has its own standards, we who presided over this case, Judge Reed and myself, held three days of hearings addressing each of these items.

Inter-draft decision, Judge Reed, has found that three out of the four points -- in three out of the four points, Pacific failed to make the required showing.

As to Point One, that the competitors have a fair and nondiscriminatory access to the exchange, there's no question about that.

The sizeable record of 271 spills over in abundance and this issue I don't think is really

disputable by any reasonable party.

However, as to the second point that there is no anti-competitive behavior, a serious question. Judge Reed pointed to two lawsuits, one brought by the competitors in 1996 and another by another competitor in 1997.

One involved Pacific's use of building information by long distance carriers that it had in its possession as a result of its business and the other involved a question of monopolization. Both suits were settled.

In addition, Judge Reed on this particular point has found that Pacific has such an advantage in selling long distance services to customers because ... that it's almost not fair and what she means by that is this.

An incoming call comes to a Pacific customer for service or changes in billing, billing disputes, et cetera, that customer is giving Pacific a warn fall (phonetics).

That's quite a bit different than what the Silexes have to do, the competitors have to do, and that is to go out and make cold calls to market their

product.

So, there is that advantage which at the present time as yet is uncurred (sic).

Then, we go on to Point No. 3, that there's no improper cross-subsidization. In other words, there's no use of the regulated utility to benefit or subsidize the long distance affiliate.

Well, there's always a problem there because you have a customer service representative working for Pacific Bell, the utility, getting the incoming calls and being able to market the long distance service.

Obviously, in that situation, what you have is you have the utility benefitting the long distance affiliate.

So, that matter has to be dealt with and that matter has to be cured. Otherwise, the rate-payers are not -- are really, in effect, subsidizing the shareholders of the long distance affiliate.

They have to be held harmless, and we didn't have in the presentation of the matter before us any cost allocation presented by the Company that

satisfied the Judge.

Now, Point No. 4 that there's no substantial possibility of harm from Pacific's entry into the long distance market.

Here, Judge Reed found two possible areas of harm to local competition.

No. One, Pacific is what they call a "PIC administrator". That's the Preferred Inter-exchange Carrier. That's the person responsible or the party that's responsible for executing switches in an unbiased manner.

You want to switch your service but you got the PIC administrator. Who's the PIC administrator? Pacific.

Will Pacific honor that request? Will Pacific try and use that proprietary information to turn the customer around and talk him out of it?

Judge Reed found that there was no immediate protection against it and, of course, she found that there was the possibility, as I said, of joint marketing.

Now, in my alternative, I have chosen to leave Judge Reed's findings untouched. I do believe

that the conditions are absolutely ripe now for Pacific's entry into the long distance market.

However, I believe that the deficiencies that she identified have to be confronted and, for that reason, I resisted efforts to change my alternate despite the fact I feel that it is in the public interest to have long distance marketing by Pacific.

But both of us, Judge Reed and I, in our various documents have constructed protections to deal with the 709.2 deficiencies.

For example, Judge Reed and myself have proposed in our alternates that in order for investigation be undertaken, to examine the efficacy, the feasibility in the selection criteria for competitively neutral third-party PIC administrator, in other words, somebody that doesn't work for Pacific Bell.

Both Judge Reed and I have attempted to deal with the joint marketing problem. She in her most recent changes to her order has said that the scripts that Pacific uses to talk to the customer, you know, that has the incoming call about long distance be filed with this Commission and reviewed by this

Commission on a regular basis.

What I have done in my alternate is set forth a protocol, very much like the protocol that is required by Pacific in dealing with local customer calls and that is, for example, a customer calls you -- a call comes in.

Pacific has to deal with the customer request first. Then Pacific is allowed to ask them whether or not they're interested in long distance service.

If they say no, Pacific is supposed to honor that request. If not, they say it's okay, they're kind of interested, they have to under FCC regulations provide a list of three randomized names, companies that are long distance carriers in addition to themselves.

If the party indicates that they're interested in Pacific's service at that point, then the customer or representative can attempt to make the sale of the long distance service.

But what you have is you have a protection against overbearing conduct. You have a protection -- you have full disclosure as to the cost and, finally,

what you do is you mitigate the advantages that Pacific has in dealing with warm calls as opposed to cold calls.

Also, I have required in my alternate a detailed accounting and auditing to ensure that no cross-subsidization occurs.

Pacific's long distance affiliate is supposed to pay its way in terms of using the local service and Judge Redd has asked that there be a study of cost effectiveness to explore the idea of separating the wholesale network from retail services.

So, that's a variation. Whether Judge Reed's decision or mine is accepted, there will now be strong protections against the dangers that 709 sought to deter.

Once adopted and once implemented, we will present the most opportune conditions for a truly competitive market.

The interested parties do not ask us to bar Pacific's entry into the intrastate inter-exchange service.

Instead, they ask us to apply conditions that they contend will counter potential harm that

Pacific might inflict on the InterLATA market.

In other words, with either decision, I think what we're doing is we're addressing the primary concern of competitors and the primary concern of the competitors is not eliminate Pacific's availability in any long distance service just to make sure that they, as competitors, are not severely disadvantaged.

Now, there's one other item I want to address before I end this rather long presentation and I apologize for it and that is that recently, a few days ago, we received a letter from Senator Boehm (phonetics) which said, in effect, that if we pass out this particular order or Judge Reed's order, what we may be doing is violating Article III of the state Constitution because, according to the rationale, what we would be doing was we would be preempting state law.

We were saying that federal law preempts, trumps state law on the issue of long distance marketing and that we are, in effect, declaring 709.2 inoperative because it conflicts with the federal statute.

I thought long and hard about that and my

reply to that is this.

We are not doing that. We are not authorizing in any order that we have before us today Pacific to enter the intrastate long distance market.

What we are doing is we are passing on an appraisal of the compliance with the checklist items and we are, in fact, denying Pacific's 709.2 motion that declares that Pacific is in compliance with the checklist items therein.

So, it may come to pass that an intrastate long distance service is inextricably related and can't be separated out and it may come to pass that somebody may -- some party may have to deal with a preemption issue but that's not what we do today.

So, we are not in violation of Article III. We're not preempting any state law. In fact, we're applying state law in this situation and we're applying it very judiciously.

So, I think that that argument is really spurious and ill-considered.

Now, with this order, we, therefore, forward our findings to the FCC and we imposed new protections to dissipate the dangers spoken to in

709.2 and I hope we will revisit the unfinished business of 709.2, the three checklist items that are in our state statutes which are unsatisfied sometime at least before the FCC decides whether or not Pacific is to enter the long distance market.

And, with that, I'd like to just conclude by thanking the various people that have worked so hard on this very very difficult issue and I'd like to start, of course, with Jacqueline A. Reed who presided over these hearings for many years, did a wonderful job as a Judge.

It was a pleasure to work with her and I really admire both her intelligence and her patience and her fortitude

[Applause]

I think that something should be said about the staff: Paul King; Peter Chan; Joseph Abullamen (I hope I'm pronouncing your name right); Whamen Aramin; Vishu Chattergee; Aram Chamavon; Phyllis White; Mike Amato; Johnny Farmer; Rob Wellington; Facil Fanig; Commissioner, my predecessor in this matter; Commissioner Lynch and my predecessor even before that; Commissioner Neeper (phonetics).

There's probably names out there that I have omitted but I can say it has been fun working with all you parties, you Silexes and you incumbents.

Next time, Commissioner Lynch, I'll know better. (Laughter). Yes. I'm going to move both Item H-6 and Item H-7 and H-7a.

PRESIDENT LYNCH: I have a point of information, --

COMMISSIONER BROWN: Sure.

PRESIDENT LYNCH: -- Commissioner Brown, to start.

I just want to make it clear as we discuss. It's my understanding that H-7a are changed pages or alternate pages and not an entire --

COMMISSIONER BROWN: That's right.

PRESIDENT LYNCH: -- provision.

So that, necessarily, if you want 7a considered, we'd need to vote on 7a first --

COMMISSIONER BROWN: Right.

PRESIDENT LYNCH: -- because it would either modify or not modify the actual decision. You're just confirming it, correct?

COMMISSIONER BROWN: That's right.

They're just changed pages. Yes.

PRESIDENT LYNCH: Commissioner Brown has then moved Item H-7a and, thereafter, Item H-7. Are there questions or comments?

COMMISSIONER BROWN: Well, there has got to be comments but go ahead.

PRESIDENT LYNCH: Who would like to start? It doesn't matter who.

COMMISSIONER PEEVEY: Well, I'll be happy to start.

PRESIDENT LYNCH: Commissioner Peevey.

COMMISSIONER PEEVEY: Such indecision is unbecoming. (Laughter).

You know, I ....

PRESIDENT LYNCH: It's deference to my colleague.

COMMISSIONER PEEVEY: Yeah, it's -- and it's extremely thoughtful.

COMMISSIONER WOOD: We're still making up our minds how to vote.

COMMISSIONER PEEVEY: Barely.

This is a long awaited decision, it goes

without saying. The proposed decision finds that PacBell has complied with the majority of the fourteen point checklist, the Federal Telecommunications Act as Commissioner Brown has indicated.

The bottom line from my perspective for the public is that the proposed decision and I'm talking about 7, in effect, finds that California has done a responsible job in opening up to a competitive market.

Findings today indicate our readiness to provide a recommendation to the FCC that PacBell shouldn't be allowed into the long distance market.

As anecdotal evidence, we have all seen recent advertisements from the Silexes that offer local service to residential subscribers; in fact, an abundance of such advertisements.

When PacBell receives approval to provide long distance service from the FCC, I anticipate that we will be stronger effort to attract customers by them and many others.

The public will benefit from increased competition, both local service and the long distance markets.

On this one point about being in the public

interest, I disagree with the proposed decision. The PD finds that Pacific has largely met the fourteen point checklist but that we cannot find that Pacific's entry, quote, "will primarily enhance the public interest," on Page 266.

The same language is included as a part of finding of fact No. 336.

I believe that the PD has misrepresented the Code. Section 709.2(c)(4) states that we must determine that there is, quote, "no substantial possibility of harm to the competitive intrastate inter-exchange telecommunications markets," end of quote.

Hypothetically, if Pacific's entry into the long distance market were to be neutral, then it would fail the PD's standard of demonstrating an enhancement of the public interest.

However, if the effect were neutral, then it would meet the standard in the Code which is that there would be no harm.

This is a critical difference and I will file a concurring opinion which dissents, in part, on this issue.

Moving now to the alternate, that's 7a, a proposed in methodology to allow Pacific to jointly market that involves numerous conditions, where I am not opposed conceptually to it, I find that the proposed decision is preferable, in part, due to its simplicity.

So, my inclinations to vote no against the alternate.

On another matter as Commissioner Brown has noted, Senator Boehm, the Chair of the State Senate Committee, sent a letter to all of us, indicating her concern about Section 709 and the protocol used to resolve differences for potential federal preemption.

I read the letter and saw the attorneys and I am confident that we, the Commissioners, are very sound legal ground if we proceed with a decision positively on Item 7.

However, on this matter, to present a more complete picture, I just want to acknowledge that I have also received letters in support from many many others, including starting with the Lieutenant Governor and various other Senators, including Polanko and Morrow and Assembly members too numerous to

mention.

All support the 271 decision and asked that we act in a timely manner.

Obviously, we need to judge this case on its merits and not on the number of legislators who line up on one side or the other.

On the other hand, I think we should be aware of the position as stated by these elected officials.

I also, without repeating what Commissioner Brown has said, I want to thank all those that have been involved.

I think this actually goes back even the Commissioner -- need for the Commissioner Knight (phonetics) at this Commission and the hard work of Commissioner Brown in getting this to the finish line after so many years.

And my hat goes off the ALJ and to all the staff that have worked so hard on this.

So, I support H-7 and will file a concurring opinion that dissents inquired. Thank you.

PRESIDENT LYNCH: Commissioner Duque?

COMMISSIONER DUQUE: Thank you,

President Lynch.

Colleagues, I'd first like to thank Commissioner Brown for finally bringing this decision to the Commission for our vote.

ALJ Reed deserves our gratitude for literally years of diligent effort and patience.

The members of the Telecommunications Division truly deserve our appreciation and recognition for their committed and professional work.

They have gone beyond the call of duty to produce a credible report that the State of California can be proud of.

My thanks go to each of our current and former members of the professional and support staff, some of whom have left the Commission and some of whom have moved on to other recitals.

This case has out-lasted many staff members and scores of parties, including three Commissioners and four and-a-half years of convoluted and protractive history.

To the relief of many but Pacific, in particular, we now have a credible advisor opinion to the FCC on whether PacBell has met the fourteen point

checklist requirement of Section 271 of the Telecommunications Act of 1996.

I wholly support this order with respect to these requirements but I will dissent, in part, with respect to the analysis and findings of California Public Utilities Code 709.2 because I believe the proposed decisions advisory opinion on this statute is redundant, uncalled for, overly simplistic, and incomplete.

To be sure, Section 709.2 is relevant as far as the Commission's determination of whether Pacific should be permitted to enter the intrastate long distance market.

The thrust of 709.2 was to ensure the long distance market will not be adversely affected by Pacific's entry into this market.

However, these very same issues were thoroughly addressed by this Commission in a previous order or, after extensive and robustly litigated proceedings, the Commission granted an affiliate of Pacific the authority to provide in-reasoned long distance service, subject to compliance with the 271 requirements of the Telecommunications Act.

In addition, to the extent the requirements of 709.2 are relevant in this stage of our advisory opinion, the underlying review criteria of 709.2 is essentially subsumed and properly addressed to the various and broader requirements of Section 271.

Therefore, Section 709.2 is a matter of principle -- as a matter of principle and procedure should have never bene rejoined with the Section 271 analysis.

Let me just give you two examples. On the issue of improper cross-subsidization, the FCC has adopted requirements in its accounting safeguards' order that go as far as auditing Pacific's long distance affiliate transactions periodically, in addition to establishing detailed accounting separations requirements.

And, yet, the proposed order in an apparent discounting of this fact oversteps and relies on anecdotal and speculative evidence of Pacific's future behavior to decline an affirmative finding.

In another more ominous analysis under Section 709.2 (c)(4), addressing whether the record supports a finding that there is no substantial

possibility of harm of Pacific's entry into the long distance market, the proposed order tramples the record, ignores the Commission's previous decision and the reality of the long distance market.

In my opinion, I find it incredible that the decision defines that there is a substantial possibility of harm to the long distance market due to Pacific's entry in its role as PIC administrator in a sector of the market where the class of economic definition of competition can be directly applied.

The long distance market is a sector where there is an abundance of competitors, enormous supply of capacity, unrestricted access to consumers where competition has progressively pushed others downward to unprecedented levels.

The PD ignores the realty that Pacific's affiliate is zero market share in the long distance market to begin with. Whereas, incumbent long distance carriers possess, collectively, a hundred percent of that market.

It ignores the fact that incumbent long distance providers are trying to shore up their losses to competitors by bungling their long distance

services with local services and aggressively entering the local market using UNE prices that possibly the lowest in the nation.

Whereas, it throws a potential road-block to Pacific's entry in the long distance market by stating that there could be a substantial possibility of harm if it enters the market.

The order confuses and it equates a potential harm to the self-interest of long distance market to a potential harm to the public's interest.

Yes. I believe it's going to be possibly harmful to the self-interest of long distance service providers, in general, to lose some or any profit share in that sector just as Pacific would consider it harmful to lose its market share in the local market.

One thing to keep in mind in this regard is that consumers are still paying a lot more for their long distance service than for a local service.

That should figure into which segment is more valuable in the marketing standpoint.

However, whoever will lose market share, this by itself does not mean that it's harmful to the public interest.

To the contrary, the interest of the public lies with Pacific's entry into the long distance market as envisioned by the Telecommunications Act of 1996.

The quid pro quo approach have established an irreversible competitive market in the local market is to be simultaneously reciprocated by granting authority to Pacific to enter the long distance market.

It is expected and desirable, for that matter, that each side experiences what they might consider out of self-interest harmful market losses which each side can shore up by picking up market share in their respective new sectors.

This is what our Section 271 is all about. The loss on one side is no less harmful than the loss on the other side.

The order I believe confuses these market protection agreements with a possibility of substantial harm and, thus, inserts a monkey-wrench in an otherwise lucid incredible analysis of Section 271.

Thus, regrettably, this is cause for me to dissent, in part, because I believe with respect to

Section 709.2, the proposed order is seriously flawed.

I will vote against the alternate and I will support the PD and will file a partial dissent.

PRESIDENT LYNCH: Commissioner Wood?

COMMISSIONER WOOD: I cam into this meeting today not really certain whether I was going to say anything on this item and the reason for that is, on the one hand, this is an extraordinarily important issue and it's one as has been described that's been before us for many years before I came onto the Commission.

It has occupied a great deal of our attention and colored virtually every proceeding involved with telecommunications.

So, not just in itself but in how it has affected everything else that's gone on. It has been a very very important case.

And so on that basis, there shouldn't have been any reluctance on my part to say anything about this.

The other side of it is that my view of the entire situation, to call it contrarian would probably be an understatement because I think it's outside of

the range of the debate that's taking place, for the most part, in the United States than it has been over the last decade or so around these issues and maybe I'm a little bit afraid to voice some of my views but, you know, fools rush in and I guess I'll do that.

I was in Washington, D.C., quite a bit the year that the Telecommunications Act was passed and I read the Washington Post everyday and almost everyday there were three or four full-page ads in the Washington Post, very expensive ads dealing with the Telecommunications Act.

They were, I think, virtually all placed either by the Bell companies or by the competitors and I look at them and read them and, for the most part, they made no sense at all.

They were utterly incomprehensible to me. So, I wondered why, you know, either I'm a complete idiot and can't understand what's being written in plain English or there is some other audience for these ads other than the ordinary newspaper reader and, of course, that was the case.

The people who read the Washington Post in addition to the people who live in the Metropolitan

area of Washington, D.C., also include Congress members and staff persons and this was just a very expensive way -- maybe it was a cheaper way of lobbying all of those people.

So, there was a ... but the debate that was taking place was one that really excluded the American people.

Things were being talked about and thought out in Congress that involved one set of large corporations fighting another set of large corporations over what were going to be the terms of battle going forward in this industry and I guess consumer organizations weighed in at the time.

I don't think they were very much of a factor in developing the details of the act and when I came here to the Commission and no longer had the luxury of just looking at this legislative framework from the point of view of a citizen -- of a somewhat interested citizen but now had to be a decision-maker and charged with following and executing the law of the land which this now was, whether it made any sense to me or not.

I had to take a closer look at these things

and, frankly, I have struggled in the three years that I've been on the Commission to understand the rationale behind this restructuring -- this attempt at restructuring the telecommunications industry.

I think that this proceeding coming to culmination today has cause my thoughts to jell quite a bit and I think the places that I have landed lead me to a couple of conclusions.

One is that I think that the promise that was held out by the Telecommunications Act was what can charitably be described as naive and based on a lot of wishful thinking and, in some respects, chasing what is going to prove, I'm convinced, to be a wil-'o-the wisp.

There is an attempt to create a competitive situation in an industry where there are constraints dictated by the technology, the size of the industry, the structure of the industry, the network nature of the industry which are going to limit the possibilities inevitably for -- END OF TAPE 1 -- so far have been the investment community.

There have been billions and billions of dollars that have been lost by investors, some of that

probably will eventually be passed on to consumers because of what proved to be imprudent investment decisions.

Maybe it's typical of a lot of the euphoria that's characterized the last decade and financial decisions that were made during that period but the fallout, it's wrong to say only investors have been affected.

There have been what? A half million workers in the industry that have been laid off? Certainly, those have been victims as well and there are, undoubtedly, more to come.

The environment of our country has been a victim. There have been roads torn up. There have been wilderness areas intruded in by laying of cable that is just going to lay there unlit for the next couple of decades, probably, because of the massive over-investment as a result of anarchy that was an introduction of what is called competition that, actually, will never lead to the utilization of these assets for true competition.

I'm not much of a prophet and I won't predict exactly where this is all going to end but I

think some things were foreseeable.

One is that -- because they're happening already -- one is that there is a strong trend towards reconsolidation of the industry.

This has been widely noted that in terms of local service, we've seen a consolidation to where there are just a couple of large local carriers who completely dominate the industry.

In some respects, it's almost like reconstruction of the old Ma Bell.

In states where the 271 entry has been approved, there has been a very large portion of the long distance market that has been acquired by the Bells and as could reasonably be foreseen, I think that will happen here.

I think that's -- frankly, I don't see a problem with that or I don't see anything wrong with it.

That reflects the desire of customers to do one-stop shopping and so they go to the shop that they're familiar with but I think that it's misleading to look at that as being something advances competition.

I've heard Pacific Bell's advocacy and explaining that this is something that advances competition.

Well, I think that's what they're forced to argue because that's the terms of the debate that are laid down by the law.

I'm not sure that it reflects reality very well going forward. I suspect that we're going to see, rather than competition emerging on the basis of different modalities, that is, wireline cellular and cable, very likely, we're going to see some further consolidation maybe not this year or next year but I can easily imagine that there will be a unification of the technologies of cellular and wireline to the point where the services are really not distinguishable.

There are already products that are being offered like that by some of the competitors. When the incumbents start offering those things, I think it's liable to blow the competitors out of the water in the cellular industry.

Where I'm going with all this is I think that we're doing something today that is dictated by the law.

I am completely comfortable voting for Commissioner Brown's alternate pages and Judge Reed's decision after it's amended.

I think that we're fulfilling our obligations under both federal law and state law and that, after all, is what my job is and, therefore, I will be comfortable voting for these items.

I think, however, that there are some things that we need as a commission and, certainly, consumers need to be looking at and that is the introduction of so-called competition has brought on whole new realms of consumer fraud.

In California, we are belatedly addressing many of those in the Consumer Bill of Rights proceeding. Other states are dealing with it in their own ways. Maybe the FCC might even get into some of these things some day.

I think that as I expect, the industry becomes remonopolized, then there needs to be at some point a serious look at how we're going to deal with that from a regulatory framework and this probably isn't the time when that's going to be debated.

It's not ripe. A few national consumer

organizations are finally backing away from their infatuation with and hopes for market solutions to consumer problems and are taking a look at this issue.

I've seen a recent article in Consumer Reports, for example, and positions by Consumer Federations of America have pointed in this direction and I expect that this will become more so as the industry does become reconsolidated.

Anyway, with that comment which is probably completely outside the bounds of what has largely been discussed before this Commission, I'll conclude the substance of my remarks.

Beyond this opinion which I've expressed on the contents and the import of today's decision, I do want to say a few words about the work of Administrative Law Judge Jackie Reed in this case.

Prior to my appointment to the Commission, I met with both Pacific Bell and its competitors and I was very quickly made aware of the extremely charged atmosphere surrounding the issue of Pacific's entry into the long distance market.

Once I came to the Commission, the pressure and the tone sharpened exponentially. Reaching a

crescendo is Pacific Bell and its competitors opining on the epic consequences for competition in the telecommunications market.

Throughout all of this, Jackie Reed has maintained a calm demeanor but she has done, I think, a lot more than just remain calm.

She has repeatedly helped me and my colleagues to focus on the key policy issues.

At times, this required her to have the courage to take positions that were adverse to parties in the case and sometimes to positions that she knew Commissioners held and to resist the efforts of parties to manipulate the timing which, after all, was an important dimension of this case.

I admire her ability to remain focused on the facts and to remain dedicated to preserving our processes here at the Commission.

At several points in the proceeding when the Commission and/or the parties tried to cut corners, the Administrative Law Judge cautioned the Commissioners against such short-cuts.

Inevitably, when corners were cut in the name of speeding up the case, no time was saved and,

in fact, often more delay was created by those attempts.

I could go on but I think that Judge Reed's draft decision speaks more eloquently than I can to her fine intellect, her analytical abilities and her unbiased approach to weighing the competing interest of parties, always keeping the interest of consumers foremost.

I'll miss working with Judge Reed on this issue but I'm sure that she's very happy to freed of this task, probably often must have seen the belong in the dictionaries is the definition for "thanklessness" but, Jackie, thank you.

PRESIDENT LYNCH: I think the best decision I have ever made at this Commission is to ask Commissioner Brown to take this case because once I took a look at it and I agree with Commissioner Wood that this was pretty charged when I got here as well.

I knew I didn't want to have to wade through the intricacies of this on a day-to-day basis and I would like to thank Commissioner Brown who has thrown his heart and his soul and his formidable intellect into this proceeding and has steered this

historic decision to a thoughtful and thorough, defensible and admirable completion and I hope that I can with the next historic decision make sure that you're just as eager and enthusiastic.

I realize that this is also a landmark decision for SBC, Pacific Bell, its competitors and for California consumers and, as we've all discussed, today is a big day for a lot of people here in this building who have spent the better part of the last four years eating, sleeping and breathing the intricacies of operational support systems and performance measurements and the fourteen point checklist and public interest standards so that we can make an informed decision today.

I also want to think the Telecommunications Division analysts, economists, lawyers and Judges who have worked tirelessly on not only this case but all the other related 271 cases and, also, I'd like to thank the Commissioner advisors.

All of the folks at the PUC have been working on this case, really have shown their dedication to California consumers, frankly, by just their tenacious analysis of many mind-numbing details.

I would also like to thank Trina Horner for all of her effort and her time and her analysis so that I could understand these complex and technical issues that were involved in this decision.

I would say to the extent that my analysis shines, it's entirely due to Trina and all the flaws in my analysis are entirely due to me.

I appreciate most of all, though, the integrity and the leadership that Jackie Reed has brought to this case.

She has guided the parties, the staff, the consultants, many assigned Commissioners with exceptional grace through four years of which have been incredibly controversial, with the most controversial and contested record at the Commission in my tenure and, at the end, she has emerged with an articulate and thoughtful conclusion.

In a way, this proposed decision and the changed pages before us is a perfect metaphor for the issues it addresses.

One could observe that California's local telecommunication service market from a fifty thousand foot perch and we can see two totally different views.

You could see an incumbent local exchange carrier providing competitors with access to its network and systems with unprecedented openness and you could also observe a crumbling telecommunications industry which is dominated now by a local service incumbent that enjoys over a ninety percent market share.

Just as those competing views of the fifty thousand foot level can yield two, I think, accurate but competing views, I think it's clear from what we've heard today that the reading of the same proposed decision can result in different conclusions.

Section 271 of the Telco Act and Section 709.2 of the California Public Utilities Code both strive to ensure healthy local and long distance telecommunications markets.

They set specific entry standards. The two sets of criteria present subtle but critical differences and, as the proposed decision notes, Section 271 approaches the accessibility of the local exchange market by meeting the fourteen point checklist.

It also allows consideration of the public

interest assessment of a Bell operating company's entry into the long distance market.

By contrast, California Public Utilities Code Section 709.2 enacted before the '96 Telco Act identifies the criteria that the Commission must use to access the public interest from the perspective of the health of the intrastate IntraLATA market.

As my colleagues have noted, the proposed decision finds that SBC Pacific Bell has met twelve of the fourteen checklist items for about an eighty-six percent success rate.

The proposed decision also finds that SBC Pacific Bell meets one of the four criteria set forth in Section 709.2 or twenty-five percent success rate.

I think we can debate for a long time whether the Commission's standard for endorsing SBC Pacific Bell's 271 application should be a hundred percent of the 271 and 709.2 criteria or eighty-six percent or something less but, by any measure, a twenty-five percent success rate for statutorily mandated criteria is not a passing grade and, therefore, the way the proposed decision analyzes these two statutory requirements presents this

Commission with a difficult choice.

Ultimately, the Commission must decide whether a vote to endorse SBC Pacific Bell's 271 application at the Federal Communications Commission is consistent with our legal obligation to uphold state and federal law.

Section 709.2 of the California Public Utilities Code enacted two years prior to the Telco Act requires that this Commission determine that:

> One, competitors have fair nondiscriminatory access to exchanges;
>
> Two, that there is no anti-competitive behavior by a local exchange telephone corporation, including unfair use of subscriber contacts;
>
> Three, that there is no improper cross-subsidization; and
>
> Four, that there's no substantial possibility of harm to the competitive intrastate exchange telecommunications market.

It's not the standard that there's no possibility of harm to the public interest as

Commissioner Duque knows.

By statute, it's that there's no substantial possibility of harm to the competitive market intrastate.

These criteria do not precisely match the Telco Act's 271 requirement but they both clearly contain a public interest criteria as a critical component.

In the Federal Telco Act, Section 271(d)(3)(c), the Telco Act anticipates that it will be critical for the FCC to consider not only the fourteen checklist but public interest criteria as well.

By providing that, the FCC, quote, "shall not approve authorization requested in an application submitted unless it finds that the requested authorization is consistent with the public interest convenient to necessity," end quote.

Clearly, our state 709.2 requirements provide a benchmark by which to evaluate the public interest of SBC Pacific Bell's 271 bid and then the question for us becomes do the federal 271 requirements preempt or supercede requirements imposed

by state law?

In my view and I believe it consistent with our oath of office to uphold state law as well as federal law, state Constitution and federal Constitution.

In my view, the way we do that is by trying to harmonize the requirements of federal law and the requirements of state law.

I think that the ability of states to impose requirements is not inconsistent with federal law and, indeed, the ability of states to prescribe additional requirements is clearly articulated as allowable in the Tunco Act.

Section 253(b) the Telco Act provides that, "nothing in his section shall affect the ability of a state to impose on a competitively neutral basis and consistent with Section 254 requirement necessary to preserve in advance universal service to protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.

And, in fact, the Telco Act also contains a savings clause that I believe puts to rest any doubt

on this question in Section 601(c)(3) or (c)(1), no implied effect.

This Act and the amendments made by this Act shall not be construed to modify, impair or supercede federal, state, or local law unless expressly so provided in such act or amendment.

Finally, Section 261(c) provides that nothing in this part precludes the state from imposing requirement on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access as long as the state's requirements are not inconsistent with this part of the Commission's regulations to implement this part.

So, then, of course, you have to look at the Commission's regulations to implement this part but all said and done, I believe we need not decide whether federal law preempts state law. Indeed, we could not decide that as Commissioners pursuant to the California Constitutional requirements here because I think that we can harmonize the requirements of Section 709.2 with the requirements of federal law under the Telco Act Section 271.

But this decision ... then we need to look at what this decision says about the requirements of 709.2.

I think put simply, according to the proposed decision, we can conclude at this time that SBC Pacific Bell has met only the first requirement of Section 709.2.

A decision endorsing SBC's Pacific Bell 271 application to enter the intrastate long distance market therefor would violate state law.

The provisions of that law are not preempted by and, indeed, are contemplated by federal law as I've discussed.

As a body and as individual Commissioners, we must act according to the laws of the State of California as well as the federal laws.

I think SBC Pacific Bell has made incredible progress in opening its local networks and its systems to competitive local exchange carriers.

Unfortunately, the record we have in this case, despite that it was four years in the making, doesn't allow it to make the remaining three findings required by state law at this time.

I know that Commissioner Brown has argued that this only an advisory opinion and I just kind of come to look at Senator Bowen's letters, Commissioner Brown's letters and the back and forth.

I'm concerned about whether we can characterize the action today as an advisory opinion because the FCC will not move forward without our recommendation here today.

There's nothing left for us to do after we vote today. We don't have further votes we must take that accrue, necessarily, for SBC Pacific Bell to then enter the long distance market and we are voting today to determine that 709.2 has not met the frontage page of the decision.

Note that we're denying that it has satisfied the (inaudible) and that's why 709 consist Public Utilities Code (sic).

Therefore, I'm deeply troubled that we can find that it would be in the publications (sic) to vote yes on this application, given that 709.2 is not affirmatively satisfied and so I go back to 709.2(c) and it directs the Commission, you know, to affirmatively find four things before the Commission

can issue an order authorizing competition intrastate inter-exchange telecommunication services.

I think the bottom line is that we've not today making the findings that we're required to make under state law and I am simply and deeply troubled whether a vote on this decision despite the fact it meets the Section 231 (inaudible) is tenable under state law.

However, I do think that Commissioner Brown's alternate cases makes this more acceptable as a decision and Commissioner Brown has lived and breathe this now for over a year. I would defer to his view of how his alternate pages treat the various marketing issues versus the proposed decision.

Commissioner Brown?

COMMISSIONER BROWN: Yes. Thank you.

What we have attempted to do in the alternate and Judge Reed has attempted to do in his draft decision is to defag the problems that are presented by -- I'll start over again.

What we attempted to do with those remedies that we put into play, for example, presenting scripts, auditing the cost allocations in terms of

cross-subsidization possibilities, imposing Tariff 12 rules in the, you know, in the marketing of long distance service is to disarm those objections that Judge Reed very well found when she heard the evidence and I heard the evidence.

There were problems that were out there and there were problems to be solved and I think that, as I said, that if we put these into effect, if we put those marketing rules into effect, if we put those auditing rules into effect that we make them file the scripts, if we continue to monitor their performance in terms of the nondiscriminatory access to the competitors of their network, we will abate and diminish and dissipate the problems that we have today.

For example, anti-competitive behavior. How are we going to control that?

Well, the most important thing that I can see if the performance measures because what the performance measures do is they compare the difference between Pacific's service to its own customers with Pacific's service to competitor's customers.

That's number one. We're backed up with

stiff monetary penalties if they don't do that.

Number two, you know cross-subsidization. Obviously, you know, you want the affiliate to pay its way.

The way the affiliate pays its way is real accounting methods that make it possible for us to see how much, you know, this is costing the rate-payer.

The third thing, of course, is, okay. How do you deal with the joint marketing? The real cat bird seat that an incumbent has in dealing with an incoming customer.

There's always going to be advantage. You're never going to eliminate that advantage entirely but with these customer service rules, what you do is you don't squelch the possibility that somebody might want Sprint or AT&T.

So, I think that we can approve the access of 271. I think that we can also deny the 709.2 compliance and we can reopen the proceeding at a later stage to see whether the rules that we put into effect today and the constructs that we put into effect today have eliminated the objections that Judge Reed and myself have found in the course of this proceeding.

And I want to make clear, you know, I mean, I was really taken aback by Senator Bowen's letter. I mean, she's a great public servant and, you know, I have been supportive but what really bothered me was that there was this inference that I would violate my oath of office, that I would do an impeachable act by declaring a particular statute in the State of California preempted which we cannot do under Article III.

And the fact of the matter is that we don't direct. We don't authorize anybody to do anything with respect to long distance service. That's not our job.

We can't say by this order, hey, you've got to... you know, Pacific Bell, you're in the in-state long distance service and that's what, you know, 709.2 would, you know, speaks to.

You know, it may come to pass as I indicated in my response to Senator Bowen that there may be a preemption issue but that's for another day and another forum and we have to confront that. That issue is not presently ripe. Okay.

PRESIDENT LYNCH: Commissioner Brown,

can I ask you a question?

COMMISSIONER BROWN: Yeah.

PRESIDENT LYNCH: Is it your view that we are affirmatively denying intrastate long distance service in this order?

COMMISSIONER BROWN: Yes.

PRESIDENT LYNCH: And then can the SBC overrule upon that?

COMMISSIONER BROWN: Well, they can try and then it's a question for, you know, I guess some sort of declaratory judgment but, you know, that is not -- you see, you know, there's probably a lot of things that we do that are subject to federal preemption.

Our problem is that we can't declare a statute preempted or unconstitutional because of a federal conflict but there are other ways that that can be addressed.

It's unfortunate, though, that we can't do it within this forum.

I mean, I'll give you an example. I mean, years ago, the ABC, the Alcohol Beverage Control agency with Peter Finnegan as the Chair declared the

fair marketing rules on liquor.

Remember those fair marketing rules? That you couldn't buy booze unless, you know, you had this high ceiling -- high floor.

They declared those unconstitutional. Well, maybe Article III was in response to that but that's not what we're doing.

We're avoiding that issue because we have to avoid it. I mean, if we could speak to that issue, we probably could, probably engage in some sort of harmonization that would make possible a more affirmative recommendation but we're constrained.

PRESIDENT LYNCH: I don't see in the conclusions of law and the order, though, where we're denying intrastate service.

I mean, I see in the title where we are and, actually, what I would like if you don't mind is just to ask ALJ Reed --

COMMISSIONER BROWN: Sure.

PRESIDENT LYNCH: -- if that's in the conclusions of the law.

COMMISSIONER BROWN: No, but you see, what they do, Pacific can't get into the intrastate

long distance market unless and until we affirmatively pass on it, you know, say that the checklist is complied with.

So, from that standpoint, you know, whether we deny them or we affirm or we don't speak to it. I mean, they don't have that authority. At least it's not given to them by us.

PRESIDENT LYNCH: I have a point of information for either the Chief LJ or the General Counsel.

What is the effect of a partial dissent? Is it a dissent or is it not a dissent? I mean, we're all kind of acting like the Supreme Court here.

So, what is the effect of a partial dissent? Go ahead.

VOICE: It seems to me that if the Commissioner votes for an item on the agenda, they have voted to approve the item.

COMMISSIONER BROWN: That's true.

VOICE: And I don't think the dissent has any effect on the vote. I think it only is an expression on the Commissioners' views.

So, it's not like, you know, the Supreme

Court where you try to figure out, you know, well, so-and-so joined part four and so-and-so joined part two.

COMMISSIONER BROWN: Let's not go to Florida.

VOICE: And try to figure out what the decision really means.

I think you're voting up or down on the agenda item and then whatever you write is just an expression of the Commissioners' views.

COMMISSIONER BROWN: Yeah, that makes sense. That makes all the sense in the world.

LADY VOICE: I would concur.

VOICE: You're concurring. You're not dissenting. (Laughter).

LADY VOICE: Okay.

COMMISSIONER BROWN: Partially? Or.... Let's go.

PRESIDENT LYNCH: Are there other comments or questions? Okay.

COMMISSIONER BROWN: Let me just summarize, just very very briefly.

I know it has gone on too long but let me

just kind of state, really, what the difference between the alternate and the proposed decision is.

The alternate really sets forth -- I think the real big difference is what you have is Tariff 12 rules in long distance marketing of incoming calls with the alternate. You do not have that with the proposed decision.

PRESIDENT LYNCH: And I appreciate that, your thorough explanation, Commissioner Brown.

As you can tell, I'm struggling with the 709.2 issues.

COMMISSIONER BROWN: And, you know, to tell you the truth, I mean, I'm comfortable with both decisions.

I just, you know, I wrote an alternate. I kind of like myself.

PRESIDENT LYNCH: And I believe that you have moved on Item H-7a, is that correct?

COMMISSIONER BROWN: Yeah, that's correct.

PRESIDENT LYNCH: Commissioner Duque?

COMMISSIONER DUQUE: If I could just make one comment on H-7a?

I've listened to all the arguments but I still can't support Commissioner Brown's alternate because I believe it potentially conflicts with the FCC's equal access order.

It will create unjustified and disparate standards with Pacific's joint marketing with their affiliate's long distance services otherwise permitted under federal law.

So, that's -- I'm getting a big frown from Trina but it's all I have to say. It's how I feel and that's it.

PRESIDENT LYNCH: Commissioner Brown has moved Item H-7a.

Will the clerk please call the role?

THE CLERK: Commissioner Brown?

COMMISSIONER BROWN: Yes.

THE CLERK: Commissioner Duque?

COMMISSIONER DUQUE: No.

THE CLERK: Commissioner Wood?

COMMISSIONER WOOD: Yes.

THE CLERK: Commissioner Peevey?

COMMISSIONER PEEVEY: No.

THE CLERK: Okay. President Lynch?

PRESIDENT LYNCH: Yes.

No. I believe those are alternate pages. We now need to vote on Item H-7 as modified by the alternate pages in Item H-7a. Is that correct?

COMMISSIONER BROWN: Correct.

PRESIDENT LYNCH: Will the clerk please call the roll on Item H-7 as modified by the alternate pages in Item H-7a?

THE CLERK: Commissioner Brown?

COMMISSIONER BROWN: Yes.

THE CLERK: Commissioner Duque?

COMMISSIONER DUQUE: Yes, and I'll file a partial dissent.

THE CLERK: Commissioner Wood?

COMMISSIONER WOOD: Yes.

THE CLERK: Commissioner Peevey?

COMMISSIONER PEEVEY: Yes, and I'll file a concurring. All right.

THE CLERK: President Lynch?

PRESIDENT LYNCH: I wish I had more time to look at the legality of these Items 709.2 issues and, as my vote will not affect the outcome of this decision, I vote no and I will file a dissent.

I believe that Item H-7 as modified by Item H-7a carries 4-to-1.

COMMISSIONER BROWN: Correct.

PRESIDENT LYNCH: All right. We're now moving on to Item H-9.

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ATTACHMENT 3

Performance Measure 6

The affidavit of Gwen S. Johnson explained that, in a few instances, where Pacific sent a CLEC both a missed commitment notice and a follow-up information notice establishing a new due date, the notice interval was improperly tracked from the latter, informational notice. See Johnson Aff. ¶ 152 n.89 (App. A, 12). Pacific anticipates completing the programming changes necessary to eliminate this issue in February 2003. Ms. Johnson's affidavit further noted that, had the transaction times in this particular situation been tracked properly, Pacific would have met the benchmark standard for PM 6-52000 in July 2002. See id. By contrast, because of the limited circumstances in which this situation occurs, see id., this issue had no effect on August results. Similarly, although properly tracking these notices in September would have slightly improved performance, it would not have resulted in Pacific meeting the benchmark. For the reasons set forth in Ms. Johnson's reply affidavit, however, these performance shortfalls are not competitively significant. See Johnson Reply Aff. ¶¶ 23-24 (Reply App., Tab 10).

OSS Versioning

Implementation of the LSOR 6.0 version currently is scheduled for June 14, 2003. At that time, version 3.06 will be retired, per SBC's versioning plan. See Huston/Lawson Aff. ¶ 251 & n.102 (App. A, Tab 11). SBC's versioning process allows CLECs to migrate to the new LSOR version at the time of the scheduled release, or to remain on their current versions and migrate later, based on their particular business needs. CLECs that migrate to the new LSOR version at the scheduled time for the release may elect to have their "pipeline" LSRs – i.e., orders that are placed prior to the release weekend – converted to the new version. In that case, all notifications for the pipeline LSRs will be on the new version. However, CLECs that elect to migrate to a new version on their own timelines (rather than on the release weekend) do not have that option. Instead, those CLECs will receive notifications on their pipeline orders in the prior version, while notifications on all new and supplemental LSRs will be sent in the new version. This information is available to the CLECs in the OSS section of SBC's CLEC Online Website, under the heading "Versioning." According to its comments, AT&T intends to migrate from LSOR version 3.06 to version 5.0x in February 2003. See AT&T's Willard Decl. ¶ 41. Because this timeline does not coincide with an SBC release weekend, after its migration AT&T will receive notifications on its pipeline LSRs in version 3.06, while notifications on all new and supplemental LSRs will be sent on version 5.0x.

DS1 and DS3 Interim Pricing

As the Commission is aware, Pacific initially sought to address concerns it expected might be raised by CLECs regarding DS1 and DS3 UNE loop rates by agreeing to treat current DS1 and DS3 loop rates as interim, as of the date of this application (September 20, 2002), subject to true-up to the permanent rates ordered in the CPUC's UNE "Relook Proceeding." In comments on the application, XO criticized this offer, arguing that it was insufficient.[1] Pacific does not agree. However, in mid-October, Pacific completed work on new cost studies for the DS1 and DS3

[1] See XO Comments at 8-11.

loop. Based upon Pacific's new proposed rates submitted to the CPUC on October 18, 2002, Pacific agreed to reduce its DS3 loop price to $573.20 during the interim period.[2]

In an ex parte filing dated November 12, 2002, XO takes issue with this latest offer. It first complains that Pacific has not offered deaveraged DS3 loop rates. But Pacific proposed a statewide rate (of $573.20) because the CPUC currently has in place a statewide average rate for DS3 loops. Of course, the CPUC may decide that it is appropriate to order geographically deaveraged rates for DS3 loops, and Pacific would obviously comply with any such order.[3] But that possibility hardly renders Pacific's current proposal unreasonable. Pacific has acknowledged that its proposed rate in the UNE Relook Proceeding is likely the rate ceiling for permanent DS3 loop rates.[4] Therefore, it was appropriate to offer CLECs this reduction during the interim period in order to give them the benefit of a lower rate.[5]

XO also continues to object to Pacific's current, CPUC-approved DS1 rate. Yet it still has failed to prove a TELRIC violation in the establishment of that rate. And, in any case, Pacific has not proposed an interim reduction to the current DS1 loop rate because Pacific's proposed rates in the UNE Relook Proceeding are higher than the existing rates.[6] Therefore, the possibility remains that rates may go up. In addition, as pointed out in Linda Vandeloop's Reply Affidavit, Pacific has provided approximately 19,000 DS1 UNEs to CLECs in California – a clear indication that the existing rate does not create a barrier to entry. It is also important to remember that these rates are interim, subject to true-up. XO is ultimately not harmed, since any difference in rates will be subject to refund/credit when permanent rates are established.[7]

XO next takes issue with the effective date of Pacific's interim offer, demanding that the effective date be established as of either September 20, 2002 (the date Pacific committed to interim DS1 and DS3 loop rates) or November 1, 2002 (the date Pacific issued the accessible letter offering a reduced DS3 rate).[8] Both proposals, however, conflict with ordinary practice before the CPUC, which provides as a general rule that contract amendments take effect 30 days after filing. Pacific's proposed effective date is fully consistent with that practice.

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[2] Vandeloop Reply Aff. ¶ 16 (Reply App., Tab 17).

[3] On February 21, 2002, the CPUC approved a geographic deaveraging settlement between Pacific, AT&T and WorldCom for particular loop UNEs that "[t]he parties agree[d] . . . brings Pacific's territory into compliance with the FCC rules on geographic deaveraging, as set forth at 47 CFR sec. 51.507(f)." D.02-02-047 (Cal. PUC Feb. 21, 2002) (App. C, Tab 75). Notably, XO could have commented on the draft decision that approved this settlement, but, as the CPUC makes clear, "[n]o comments were filed." See id. at 12.

[4] Vandeloop Reply Aff. ¶ 16.

[5] A CLEC has now agreed to both the initial offer (making DS1 and DS3 rates interim) and the second one (lowering the interim DS3 rate). Both amendments were filed today at the CPUC.

[6] Vandeloop Reply Aff. ¶ 16 n.44.

[7] Pursuant to the CPUC's procedural schedule, permanent rates are to be established by July 2003, even if an evidentiary hearing is necessary. Thus, XO's claim that it "may be years" before permanent rates are established is clearly hyperbolic.

[8] XO Ex Parte at 2-3.

Finally, XO objects to the change of law provisions included with Pacific's latest DS3 interim rate offer that would take effect in the event the Commission determines that the DS3 loop is no longer a UNE.[9] These provisions have been under negotiation between the parties. Indeed, XO admits that Pacific offered additional clarification in an attempt to address its concerns.[10] After reviewing XO's assertions, moreover, Pacific agrees that further clarification of this language is appropriate and has sent XO revised language that attempts to address its concerns on this issue.[11] As to XO's general argument regarding the change of law provisions, Pacific's proposal has the advantage of providing certainty regarding what happens if the FCC concludes that DS3 loops are no longer UNEs.

As a final note, XO has so far failed to sign even the first amendment (offering interim DS1 and DS3 loop rates), much less the additional amendment codifying the DS3 loop reduction. Pacific is committed to continuing its efforts to work with XO. Pacific has addressed XO's pricing concerns through its commitments, and it is continuing in good faith to work through subsidiary issues so that XO can take advantage of those commitments. The Commission should reject XO's efforts to obtain an advantage in these negotiations by turning every dispute into a 271 issue.

[9] Id. at 3-4.

[10] Id. at 4.

[11] The amendment Pacific filed with the CPUC today contains this revision, which removes from the amendment the bolded language identified in the XO Ex Parte at 3.